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NO. 675

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1963

CRAWFORD MARTIN, as Secretary of State of the State of Texas, JOHN CONNALLY, as Governor of the State of Texas, WAGGONER CARR, as Attorney General of the State of Texas, and EUGENE LOCKE, as Chairman of the State Democratic Executive Committee of Texas, *Defendants-Appellants*

vs.

GEORGE H. W. BUSH, MRS. TOM M. THAWLEY, ROLAND E. SLEDGE, ANTHONY J. P. FARRIS, AND BARBARA BARRETT, *Plaintiffs-Appellees*

and

PETER O'DONNELL, JR., as Chairman of the State Republican Executive Committee of Texas, WILLIAM M. ELLIOTT, as County Judge of Harris County, Texas, and ROBERT E. TURRENTINE, JR., as County Clerk of Harris County, Texas, *Defendants-Appellees*

**On Appeal from the United States District Court for the Southern District of Texas, Houston Division**

## APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Without receding from their position that other points raised in their Jurisdictional Statement also present substantial questions which should be decided by this Honorable Court, the appellants direct this reply to the Motion to Affirm to only two of the questions involved in the appeal: (1) the erroneousness of the population-only standard for apportionment of congressional districts, and (2) the inequity of ordering at-large election of all Congressmen for the State

of Texas to be effective in the 1964 elections, before the Texas Legislature can have a reasonable opportunity to enact a new districting law.

## I.

Appellees assert that all the substantial questions presented in this appeal have been briefed and argued in *Wesberry v. Sanders*, No. 22, this Term, now pending before the Court, and that there is therefore no need for further briefing and argument on these points. As to appellants' eighth point, that the District Court erred in holding that population is the only factor which may be considered in the apportionment of congressional districts, appellees say that this standard for apportionment "coincides exactly with that advocated by the appellants in the *Wesberry* case and this matter was fully covered in briefs and arguments in the *Wesberry* case. There is thus no need for further argument on this point in this appeal." (Motion to Affirm, p. 6.)

The two questions presented in the *Wesberry* case, as stated in the appellants' Jurisdictional Statement and Brief, are: (1) whether the federal courts "have jurisdiction of the action," and (2) whether the present apportionment deprives appellants of rights, privileges or immunities guaranteed by the Fourteenth Amendment to the United States Constitution. In the District Court, all three Judges concurred in the view that the existing apportionment of congressional districts for the State of Georgia reflects "a system which has become arbitrary through inaction when considered in the light of the present population of the Fifth District and as measured by any conceivable reasonable standard" (206 F. Supp. 276, at 282); but nowhere did any member of the Court suggest or inti-

mate that population was the sole factor which could be considered in arriving at a reasonable standard. To the contrary, the majority opinion said that the test for invidious discrimination involved a consideration of "all relevant factors, including a determination of rationality of state policy behind the statutory system, arbitrariness, whether the system has a historical basis in our political institutions, together with the presence or absence of political remedy." (Ibid.)

The relief which the appellants ask of the Supreme Court in *Wesberry v. Sanders* is that "the decision of the District Court be reversed, and that the Georgia Congressional District Reapportionment Act of 1931 be declared unconstitutional and that the Appellees be permanently enjoined from conducting elections for Representatives in Congress in conformity with its provisions." (Brief for the Appellants, p. 36.) Appellees ask that the judgment of the District Court be affirmed, or, in the alternative, that the appeal in the cause be dismissed. (Brief for the Appellees, p. 58.) The brief for the United States as amicus curiae, at page 44, urges that the proper disposition by the Supreme Court is a reversal of the lower court's judgment and a remand to that court for consideration on the merits. It is true that appellants argue in their brief that Representatives must be apportioned equally according to population, but the questions raised and the relief asked do not call upon the Supreme Court to go beyond declaring the present apportionment (with a ratio of more than 3-to-1 in population disparity) to be invalid. The appellants do not ask the Court to decide minimal requirements for validity. Neither of the other briefs even touches upon the standard to which an apportionment must conform or the factors which can be taken into consideration.

How, in this setting, the appellees in the present case can assert that the appellants' eighth point is fully covered in the *Wesberry* case is hard to understand. The assertion becomes even more puzzling in view of the fact that appellees themselves characterize as "insupportable" the assumption that the Supreme Court would announce guidelines in the *Wesberry* case that would be binding upon and of assistance to the Texas Legislature. (Motion to Affirm, p. 4.)

If this Honorable Court should render a judgment of reversal in *Wesberry v. Sanders*, we earnestly urge the Court to accept jurisdiction of this appeal so that it may consider and rule on this vital issue of apportionment standards.

## II.

Appellees also claim that questions relating to "timing" and at-large elections which are presented by this appeal have already been raised in the *Wesberry* case. (Motion to Affirm, p. 2.)

The majority opinion in *Wesberry v. Vandiver* stated that plaintiffs were seeking injunctive relief "to the end that no election may be held except on a state at-large basis pending redistricting on 'an equitable and representative' basis." (206 F. Supp. at 278.) The majority further said that if the Court should act to secure plaintiffs' constitutional rights, "[w]e would deny relief at this time but retain jurisdiction to again consider the contentions of plaintiffs, if necessary, *after the expiration of a reasonable time for relief by way of political remedy.*" (206 F. Supp. at 282; emphasis added.) Judge Tuttle was of the opinion that the Court should deny the injunction at that time, but should retain jurisdiction in order to give the State Legislature an opportunity to correct the existing ap-

portionment. (206 F. Supp. at 287.) The Court unanimously would have been in favor of postponing relief until a new State Legislature elected under the reapportionment ordered in *Toombs v. Fortson,* 205 F. Supp. 248, had been given a fair opportunity to reapportion the congressional districts. Neither opinion intimated that the Court would have entered an order requiring the convening of a special session of the Legislature to avoid an election at large. To the contrary, they negatived the notion of forcing the Legislature into a special session which would not give it a reasonable opportunity to redistrict in an informed and orderly fashion. This view was in keeping with the consistent action of other courts which, upon holding apportionment statutes to be unconstitutional, have allowed adequate time for the Legislature to conduct the studies which almost invariably are necessary for an intelligent redistricting. (See cases cited, Jurisdictional Statement, p. 25 and footnotes 55 and 57, p. 107.)

The appellants in the *Wesberry* case state that the Georgia General Assembly which convenes in January of 1964 "will have an ample opportunity to enact a new apportionment well in advance of the November elections" (Brief for Appellants, p. 33), and apparently would ask this Court to put into effect an order resulting in an at-large election in 1964 if the General Assembly fails to redistrict. The Brief for the Appellees and the Brief of the United States do not go into the question of "timing" at all, and neither party discusses the effect of an election at large upon the rights of the Georgia citizenry. The appellants' request for an order to be effective in the 1964 elections is the sole basis for the claim that this question has been "thoroughly and ably briefed" in the *Wesberry* case. Moreover, the facts peculiar to each case would require, in

any event, a separate consideration of the relative effect of the order on the parties and the citizens of the particular State. Manifestly, the issues raised by the appellants' ninth point of the present appeal have not been fully presented to this Honorable Court and cannot be settled in *Wesberry v. Sanders.*

Judge Noel noted in his dissenting opinion (Jurisdictional Statement, p. 80, footnote 7) that plaintiffs had avoided asking for or undertaking to defend at-large elections in the trial court. Nor do they now deny that an at-large election would deprive more voters of fair representation and produce a far more disastrous effect upon the welfare of the State and its citizens than would result from an election under the present apportionment statute. Their answer to appellants' plea that an order for at-large elections not be put into effect for the 1964 election is that there is ample time for new legislation. (Motion to Affirm, p. 5, footnote 1; p. 8.)

Appellees concede that the new legislation would have to become effective by February 3, 1964, or else the nominating procedure for the State would have to be rearranged. In his dissenting opinion, Judge Noel pointed out how unlikely it would have been to obtain new legislation before February 3, 1964, if a special session of the Legislature had been called immediately after the rendition of judgment in the District Court. By the time this appeal is acted upon, it is beyond the realm of the most optimistic expectation that new legislation could be passed and put into effect by February 3. Appellees' "ample time" contention would entail not only the enactment of a redistricting bill as emergency legislation but would require the further enactment of amendments to the Texas Election Code,

as emergency legislation, changing the primary machinery either for the nomination of candidates for Congressmen or for the nomination of candidates for all offices. The disruption of normal primary election processes would be of serious enough consequence to condemn this proposal; and if either of the legislative measures failed to receive the necessary two-thirds vote for immediate effectiveness, the result would be utter chaos.

As appelles state (Motion to Affirm, p. 8), prior to 1959 the filing date in the primary elections was the first Monday in May. But at that time the date of the general primary election was the fourth Saturday in July. Art. 13.03, Vernon's Texas Election Code. Under present law, the general primary is held on the first Saturday in May. A simple change in filing date would not suffice unless both bills were passed *as emergency legislation* before February 3, 1964.

Appellees charge that appellants "merely rely on speculation concerning whether the Legislature would or would not take the necessary action." (Motion to Affirm, p. 8.) Expectation last September and October that the Legislature could and would enact the necessary laws to prevent at-large election of Congressmen in sufficient time and by sufficient vote to avoid a disruption of orderly election processes was, in Judge Noel's words, "euphoric and * * * misinformed." (Jurisdictional Statement, p. 80, footnote 7.) Appellees' speculation that this result could now be accomplished is nothing short of fantastic, unless they rely on the "cathartic" coercive threat of an at-large election to bring it about. We urge, with Judge Noel in his dissenting opinion (Jurisdictional Statement, pp. 110, 112) that the Texas Legislature not be forced in panic

to redistrict the State and that it be allowed to approach the problem in a calm and orderly manner.

Appelles would leave the impression (Motion to Affirm, p. 5) that the Governor of Texas has taken a categorical position against calling a special session of the Legislature to consider congressional redistricting, thus making the next regular session of the Legislature in 1965 the earliest time at which the Legislature could act. The truth is that the Governor has never taken the position that he would not call a special session when sufficient guidelines has been laid down to enable the Legislature to act intelligently, if new legislation was needed and if the time element permitted its enactment before the next election. But it is now impossible to convene a special session of the Legislature in time for orderly consideration and enactment of new legislation to be effective in the 1964 elections. Appellees say that the appellants' "summary rejection of the trial court's reasoned conclusions is the core of appellants' ninth point and such point is therefore as insubstantial as the preceding eight points." (Motion to Affirm, p. 9.) In other words, appellees anchor their claim of insubstantiality to appellants' exercise of their right of appeal. We cannot believe that questions of equity and justice become insubstantial because a party refuses to forego his right of appeal.

In whatever manner the Court disposes of this appeal, we urge the Court not to allow the District Court's order for at-large election of Congressmen to apply to elections held in the year 1964.

Respectfully submitted,

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## PROOF OF SERVICE

I, ALBERT P. JONES, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 27th day of December, 1963, I served copies of the foregoing Brief in Opposition to Motion to Affirm on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To WILLIAM B. CASSIN, ESQ., 1600 Esperson Building, Houston, Texas 77002, and THAD T. HUTCHESON, ESQ., 2110 Tennessee Building, Houston, Texas 77002, Attorneys for Plaintiffs-Appellees.

To JOE RESWEBER, ESQ., County Attorney of Harris County, Texas, Attention of Charles F. Mitchell, Esq., Assistant County Attorney, 202 Courthouse, Houston 2, Texas, Attorneys for Defendants-Appellees William M. Elliott, County Judge of Harris County, Texas, and Robert E. Turrentine, Jr., County Clerk of Harris County, Texas.

To PATRICK B. GIBBONS, III, ESQ., 1400 First National Bank Building, Dallas, Texas, and ROBERT E. NEWEY, ESQ., Houston First Federal Building, Houston, Texas, Attorneys for Defendant-Appellee Peter O'Donnell, Jr., Chairman of the State Republican Executive Committee of Texas.

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